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IN THE

Supreme Court of the United States

October Term, 1959

No. 272

BERKSHIRE FINE SPINNING ASSOCIATES, INC.,
Appellant,

v.

CITY OF NEW YORK; LAWRENCE E. GEROSA, Comptroller of the City of New York; GEORGE M. BRAGALINI, Treasurer of the City of New York; and ALEX E. FRONTERA, Collector of the City of New York,
Appellees.

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

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Appellees.

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

Appellant appeals from the final judgment and remittitur of the Court of Appeals of the State of New York dated and entered the 12th day of March, 1959, affirming the order and judgment of the New York Supreme Court, Appellate Division, First Department, which dismissed the complaint and reversed the order and judgment of the New York Supreme Court, New York County, granting appellant declaratory judgment that the New York City General Business Tax laws are unconstitutional as applied to tax appellant, and judgment for the refund of such taxes paid by it for the years 1947, 1948 and 1951.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A, *infra*, p. 23) is reported at 5 N. Y. 2d 347. The prevailing and dissenting opinions of the Appellate Division (Appendix A, *infra*, pp. 36, 44) are reported at 6 A. D. 2d 252, 176 N. Y. S. 2d 77. The opinion of the New York Supreme Court, New York County (Appendix A, *infra*, p. 48) is reported at 11 Misc. 2d 605, 177 N. Y. S. 2d 626.

Jurisdiction

Appellant commenced this action in the Supreme Court of the State of New York, New York County, pursuant to Section 473 of the New York Civil Practice Act, for a declaratory judgment that the laws imposing the New York City General Business Tax, as applied to tax appellant, are unconstitutional for offense against the Commerce Clause (Article I, Section 8, Clause 3) and the Due Process and Equal Protection Clauses (Fourteenth Amendment) of the Constitution of the United States, and for the refund of such taxes. Such declaratory judgment, together with judgment for the refund of the taxes paid under protest, was granted by the New York Supreme Court; a divided Appellate Division reversed, and dismissed the complaint; and the Court of Appeals affirmed the Appellate Division and upheld the validity of said laws, as so applied. The judgment of the Court of Appeals of the State of New York, from which this appeal is taken, was dated and entered March 12, 1959 (Appendix A, *infra*, p. 33) and is final. *Dept. of Banking* v. *Pink*, 317 U. S. 264, 63 Sup. Ct. 233, 87 L. Ed. 254 (1942). The notice of appeal was filed in the Supreme Court of the State of New York, New York County, on June 8, 1959.

Jurisdiction of this appeal is conferred on this Court by 28 U. S. C., Section 1257(2). Cases sustaining the jurisdiction of the Court on this appeal include *West Point Gro-*

cery Co. v. *Opelika*, 354 U. S. 390, 77 Sup. Ct. 1096, 1 L. Ed. 2d 1420 (1957); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 74 Sup. Ct. 396, 98 L. Ed. 583 (1954); *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 72 Sup. Ct. 424, 96 L. Ed. 436 (1952); *Freeman* v. *Hewit*, 329 U. S. 249, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946); *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 67 Sup. Ct. 156, 91 L. Ed. 80 (1946); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365 (1938); *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239 (1921).

Statutes Drawn in Question

The statutes, the validity of which is drawn in question on the ground that the same violate the Commerce Clause of, and the Fourteenth Amendment to, the Constitution of the United States, are Section 24(a) of the New York State General City Law (20 Consol. Laws of New York, Section 24-a; L. 1941, Ch. 199, Section 1, as amended) and Sections B46-2.0 to B46-11.0 of the Administrative Code of the City of New York (Local Law No. 14 of 1946, Local Law No. 44 of 1948, and Local Law No. 72 of 1950).

Section B46-2.0 of the Administrative Code provides, in pertinent part:

> "SEC. B46-2.0. IMPOSITION OF TAX—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales within such city, for each of the periods of one year, * * * every person shall pay an excise tax * * * upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence * * *.
>
> "b/. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason

of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision."

The foregoing generally follows the enabling act, Section 24(a) of the General City Law, which, together with certain additional provisions of the City Administrative Code and the Comptroller's Regulations, are set out, in pertinent parts, in Appendix B, *infra*, pp. 50-54.

Questions Presented

1. Whether said laws, applied to tax appellant, a Massachusetts corporation, with no receipts having any connection with the City of New York except the proceeds of sales to purchasers within said City of goods manufactured by appellant outside the State of New York and delivered to said purchasers outside said State, deprive appellant of its property without due process of law, and deny it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and violate the Commerce Clause thereof, when said laws impose the tax on "only that part" of appellant's aforesaid receipts which is "properly attributable and allocable to the doing of business in the city," but (except as they empower the Comptroller of said City, an administrative officer, to

establish a basis of apportionment) do not otherwise prescribe or define whether any, or, if any, which, of appellant's said receipts shall be subjected to the tax; when, on different methods of apportionment, heretofore sustained by this Court as proper, the base of the tax imposed on appellant by said laws, and hence the tax, might, in equal compliance therewith, have varied by more than three thousand percent; and although the base of the tax imposed by said laws on taxpayers engaged in intra-city commerce is definite and certain.

2. Whether said laws, applied to tax appellant "for the privilege of carrying on" its business within said City, and "upon" its gross "receipts received in and or allocable to" said City, violate the Commerce Clause of the Constitution, when appellant negotiates its said sales through its solicitors working out of two sales offices maintained by it in said City, but does not within said City or State engage in any business or activities beyond such negotiation of such sales and subsidiary activities incidental thereto, or make any local sales, or maintain any other office, or any store, warehouse, inventory, or stock of goods.

3. Whether said laws, applied to tax appellant, deprive it of its property without due process of law, and deny it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution, and violate the Commerce Clause thereof, when appellant is taxed thereunder upon that part of its aforesaid receipts from sales to purchasers within said City which is produced by application against such receipts of whichever is the *greater* of (a) 33⅓%, or (b) the average of a "property" factor, a "wages" factor, and a "receipts" factor, which receipts factor is fixed at not less than 33⅓% of appellant's said receipts; when appellant's property factor is less than 2%, its wages factor is less than 3%, and its receipts factor, apart from said fixed 33⅓% minimum, is 0%; and when the taxes exacted from appellant pursuant to said apportionment are many times the taxes applicable under said laws to taxpayers engaged in wholly intra-city commerce, hav-

ing receipts equal to that part of appellant's said receipts produced by application of the average of appellant's said factors.

4. Whether said laws, applied to tax appellant, deprive it of its property without due process of law, and deny it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution, and violate the Commerce Clause thereof, when, as construed by the New York Court of Appeals, said laws empower said Comptroller, eight or more years after the close of the privilege and taxable period, and after the basis of apportionment prescribed by him and applied to appellant has been judicially disapproved, retroactively to prescribe and apply to appellant a different, although still undefined, basis of apportionment, so that said laws deny appellant any effective remedy against unconstitutionality arising out of any vice of apportionment; whereas, as applied to taxpayers engaged in wholly intra-city commerce, said laws do not authorize any variation or change in, or any retroactive determination of, the tax base.

STATEMENT OF THE CASE

Facts

The facts are not in dispute:

Appellant, a Massachusetts corporation, is engaged exclusively in manufacturing textile fabrics and curtains, and selling the same (so far as New York City or State is concerned) exclusively interstate. All of appellant's receipts are from sales of such textile fabrics and curtains so manufactured by it.

All of appellant's plants, factories and machinery, which during the years at issue averaged $5,706,375 in value, are installed, operated and maintained in Rhode Island, Massachusetts and Vermont; and, except for office furniture, averaging $40,060 during the years at issue, all of appellant's average of $14,339,063 of tangible personalty is located out-

side the City and State of New York. All of appellant's manufacturing is carried on at its said factories or plants located in the States of Rhode Island, Massachusetts and Vermont. No plant, factory, warehouse or store is maintained by appellant in the City or State of New York; and appellant holds no inventory or stock of goods in New York City or New York State.

Until sale, all of appellant's goods are located outside the City and State of New York; and, upon sale, all of such goods are delivered to the purchasers outside the City, and the State, of New York.

Appellant maintains two rented sales offices in New York City, at which appellant is engaged in negotiating sales, interstate, of the textile fabrics and curtains manufactured by it. At such offices, appellant employs sales and clerical personnel, averaging about 90, out of appellant's total employees averaging about 8,500; it checks the credit of prospective purchasers; it arranges for advertising; it ascertains the requirements of the market; it purchases some designs for printed fabrics; it adjusts some complaints; it receives proposals to buy, obtained orally from prospective customers by its solicitors and, if such proposals are found acceptable, it issues written offers to sell, for submision to and acceptance by customers; it issues invoices as to some classes of goods; and it receives and banks the proceeds of such interstate sales.

Appellant engages in no other activities in the City or the State of New York. The reference in the opinion below to "important services before and after sale" appears to be to services rendered by appellant's New York offices to appellant, rather than to customers; and the statement that appellant's New York activities "include a substantial measure of control * * * of production * * * [and] * * * shipment" appears to refer to the facts that the New York offices ascertain, and report to the home office, the styles of goods in demand in the market, and that shipments are

made only after clearance by the credit manager, located in New York.

The Questions Presented Were Ruled Upon Below

All of the questions presented were raised in the pleadings[1] and briefs and argued in the courts below. The New York State Supreme Court, New York County, having held the statutes unconstitutional on one of the grounds asserted, found it unnecessary to pass upon the others. The Appellate Division, in upholding the validity of the statutes, and the tax, necessarily ruled on all the constitutional questions raised, and also expressly ruled upon them in its opinion. The New York Court of Appeals, in sustaining the validity of the statutes, and the tax, also necessarily ruled on all the constitutional questions raised, and also expressly ruled upon them in its opinion.

THE QUESTIONS PRESENTED ARE FEDERAL AND SUBSTANTIAL

The First Question Is Substantial

All of appellant's receipts are from sales of goods; and all of such sales fall into two categories: those wholly foreign to New York City, and those of goods manufactured, located and delivered outside New York State to purchasers located within the City. The statutes under review do not purport to tax receipts from sales in the first category; and they purport to tax "only that part" of receipts from sales in the latter as is "properly attributable and allocable to the doing of business in the city." The statutes contain no other statement or definition of whether any, or, if any, which, of appellant's receipts are to be subjected to the tax.

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[1] Printed Record on Appeal, fols. 249, 250, 261, 262.

"An undetermined tax is in law no tax." (Cooley on Taxation (4th Ed.), Sec. 1031, p. 2084.)

" * * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391; 46 Sup. Ct. 126, 127; 70 L. Ed. 322, 328 (1926). *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516 (1921); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 47 Sup. Ct. 681, 71 L. Ed. 1146 (1927).

And the principle applies with equal force to civil, as well as to criminal, statutes. *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 45 S. Ct. 295, 69 L. Ed. 589 (1925); *Cline* v. *Frink Dairy Co.*, *supra*.

The standard of certainty required of taxing statutes, like that demanded of criminal statutes, and for much the same reason, is high. "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language * * *." *Eidman* v. *Martinez*, 184 U. S. 578, 583; 22 Sup. Ct. 515, 517; 46 L. Ed. 697, 701 (1902).

As persons are entitled to know what acts are subject to criminal penalties, so that they may govern themselves accordingly, so also are taxpayers entitled to know what property or activities are subject to tax, so that they may so arrange their affairs as to minimize or avoid taxation. *Bullen* v. *Wisconsin*, 240 U. S. 625, 630, 631; 36 Sup. Ct. 473, 474; 60 L. Ed. 830, 835 (1916); *Lewellyn* v. *Frick*, 268 U. S. 238, 252; 45 Sup. Ct. 487, 488; 69 L. Ed. 934, 936 (1925); *Nichols* v. *Coolidge*, 274 U. S. 531, 47 Sup. Ct. 710, 71 L. Ed. 1184 (1927); *Coolidge* v. *Long*, 282 U. S. 582, 51 Sup. Ct. 306, 75 L. Ed. 562 (1931).

That the purported definition of the base of this tax is wholly vague, when applied to this appellant, is demon-

strable: Among others, any basis of apportionment sustained by this Court is, obviously, "proper" and would, therefore, comply with the definition of these statutes. But this Court has sustained a number of widely different bases of apportionment; and these, applied here, would produce as widely divergent tax liabilities. For example, both the basis of apportionment sustained by this Court in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. Ed. 165 (1920), and that sustained in *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135 (1918), are "proper"; and therefore either would equally comply with these New York statutes. But (to illustrate by using the figures for 1951, one of the years at issue), were the one basis of apportionment to be employed, the base of this tax would be $17,281.76 of appellant's receipts, and the tax would be $34.56, whereas, were the other basis to be applied, the base of the tax would be $635,824.81, or almost thirty-seven times as much.[2]

The provision delegating to the Comptroller the power to fix the basis of apportionment cannot cure the vagueness, because the delegation could be valid only if the statutes were definite. The basis of apportionment is an essential of the tax, for it alone determines appellant's tax base. It is not stated in the statutes; and the Comptroller could lawfully supply it only if the statutory standards were definite and certain, and left only administrative details, instead of the base of the tax, to his discretion. Article III, Section 1, of the New York Constitution provides that the legislative power shall be vested in the Legislature; and the law of New York is clear that "* * * it would be incompetent for the legislature to leave to a state officer or department the power to determine whether a tax should be levied, or at what rate, or upon what property * * *."

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[2] The tax was actually imposed on $2,400,244.67 of appellant's receipts; and the tax actually exacted from appellant for 1951 was $4,800.49.

Gautier v. *Ditmar*, 204 N. Y. 20, 28 (1912). *People ex rel. Hopkins* v. *Bd. of Sup. Kings County*, 52 N. Y. 556 (1873).[3]

But we submit that these statutes are wholly vague, and that application thereof to tax appellant deprives it of its property without due process of law. Moreover, the vague provisions are directed against receipts from interstate commerce alone, whereas the base of the tax on receipts from intra-city commerce is definite and certain in the statutes. Thus, we submit further that the vagueness of these statutes also denies appellant the equal protection of the laws, and discriminates against its interstate commerce.

Appellant has no means of ascertaining how many business enterprises whose receipts are of a character requiring apportionment may be operating in the commercial center of New York, but it ventures to suggest that both the numbers of such potential taxpayers and the volume of their receipts must be large. Accordingly, it urges that this question is of wide importance.

The Second Question Is Substantial

The New York Court of Appeals denominated this tax a privilege tax; it is, in terms, both imposed "for the privilege of carrying on" business in the City and laid "upon" gross receipts; and this Court has already decided that, applied to interstate commerce, this identical tax is void.

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[3] Thus, it appears that the decision below is that the statutes are definite, and not that taxes may be imposed by administrative officers. Had that been the decision, we should urge that these statutes deny appellant the due process guaranteed by the Fourteenth Amendment, by violating the fundamental law that the power of taxation is exclusively in the elective legislative representatives of the people. *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; 4 L. Ed. 579, 607 (1819); *U. S.* v. *New Orleans*, 98 U. S. 381; 25 L. Ed. 225 (1878); *Meriwether* v. *Garrett*, 102 U. S. 472, 26 L. Ed. 197 (1880); *Thompson* v. *Allen County*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472 (1885).

Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 67 Sup. Ct. 815, 91 L. Ed. 993 (1947).

As recently as February 24, 1959, this Court, in *Northwestern States Portland Cement Company* v. *State of Minnesota*, 358 U. S. 450, 458; 79 Sup. Ct. 357, 362; 3 L. Ed. 2d 421, 427, took occasion to reiterate that "* * * it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce."

Thus, the open point on this question is whether, as a matter of law, appellant's activities in the City of New York constitute interstate commerce; and this, in turn, was, by the decision below, made to turn upon whether this Court, in one or both of *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, 71 Sup. Ct. 377, 95 L. Ed. 517 (1951); and *Field Enterprises, Inc.* v. *State of Washington*, 352 U. S. 806, 77 Sup. Ct. 55, 1 L. Ed. 2d 39 (1956), overruled its prior decisions in *Cheney Bros. Co.* v. *Mass.*, 246 U. S. 147, 38 Sup. Ct. 295, 62 L. Ed. 632 (1918); and *Alpha Portland Cement Co.* v. *Mass.*, 268 U. S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916 (1925), and laid down a new rule that the fact that a taxpayer maintains, and channels his orders through, an office in a taxing jurisdiction deprives his otherwise interstate commerce of the protection of the Commerce Clause, although he makes no local sales, and although the only activities of such office, and of the taxpayer in the taxing jurisdiction, consist of the negotiation of sales of goods located and delivered to the purchasers in other states, and subsidiary activities incidental thereto.

After this Court's *Norton* decision, but before its *Field* decision, the New York courts continued to hold that, even though a taxpayer maintained, and operated through, an office in the City of New York, he was nevertheless constitutionally immune from this tax, if the activities of that office, and of the taxpayer in the jurisdiction, were limited to the negotiation (including subsidiary activities) of sales of goods or services delivered outside the state. *Matter*

of United Piece Dye Works v. *Joseph*, 282 App. Div. 60, 121 N. Y. S. 2d 683, aff'd 307 N. Y. 780, 121 N. E. 2d 617; cert. den. *sub nom. Gerosa* v. *United Piece Dye Works*, 348 U. S. 916, 75 Sup. Ct. 298, 99 L. Ed. 718 (1955).

In the case at bar, however, the *Field* decision having intervened, it was held that, under the *Field* case, and under the *Norton* case, now reinterpreted in the light of the *Field* case, the fact that appellant maintained an office in New York City, out of which its solicitors worked, through which they channeled the orders they obtained, and at which appellant also carried out the subsidiary activities of passing on the credit of prospective purchasers, ascertaining the requirements of the market, receiving payments and signing offers to sell for acceptance by customers, was sufficient to form a lawful basis for the tax. In this, we submit, the New York court erred; and, in our view, the error resides in a misinterpretation of this Court's *Norton* and *Field* decisions and in a disregard of its *Northwestern Cement* decision.

The *Norton* decision was, we submit, misinterpreted when the New York court failed to differentiate between (a) sales engendered by the operation of a local store regularly making local sales over the counter, as in the *Norton* case, and (b) sales engendered by the solicitation of salesmen working out of a local sales office, as in the instant case. The proceeds of Norton's sales, even when the goods were delivered outside the taxing state, were held subject to the tax when the orders were obtained by the clearly local activity of operating a local retail store. But appellant operated no retail store in New York City and made no local sales. All its orders were obtained exclusively by the solicitation of its salesmen; and this, the drummer cases hold, is a part of interstate commerce.

The *Field* case was, we submit, misinterpreted when the New York court disregarded the fact that all of Field's goods were sold under contracts expressly requiring Field

to pay the cost of transportation[4], and when it assumed that the *ratio decidendi* of this Court's decision in the *Field* case (which was without opinion except as the *Norton* case was cited as controlling) was that part of the *Norton* decision that sustained the tax on sales engendered by the activities of Norton's local retail store. But we submit that there is no parallel between the *Field* case, on the one hand, and the mentioned part of the *Norton* case, on the other. Field maintained a local sales office, but no local store; and all its orders were engendered exclusively by the activities of its solicitors. The parallel that does exist between the *Field* case and the *Norton* case is between the former and that part of the latter that sustained the Illinois tax on those of Norton's sales that were of goods shipped into Illinois on order, but delivered locally.

We submit that although the *Norton* case sustained the tax on the proceeds of sales of goods delivered outside the state, when the orders were obtained by the activities of a local retail store, it did not change the pre-existing law that the proceeds of sales of goods delivered outside the state are immune from local privilege taxes, when the orders are obtained through the activities of a local sales office, as opposed to a local retail store. Indeed, the *Norton* case itself exempted the proceeds of those of Norton's sales of goods delivered outside the state that were not generated by the activities of the local retail outlet. We submit that the *Field* case, in which it appeared that all goods sold were delivered in the taxing state, is wholly irrelevant and beside the point.

Thus, we submit that neither the *Norton* case nor the *Field* case changed the pre-existing law; and that the law as it exists today, and as it applies to this cause, remains that the maintenance of a local sales office in a taxing juris-

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[4] So that, under the Uniform Sales Act (Rule 5, Sec. 63.04.200 R.C.W.) title to the goods passed to the customers on delivery in Washington.

diction will not suffice to deprive otherwise interstate commerce of the protection of the Commerce Clause.

That such is indeed still the law is, we submit, established by this Court's 1959 decision in the *Northwestern Cement* case, *supra*, p. 12. Not only was the *Alpha Cement* case, *supra*, p. 12, cited therein with approval at footnote 7 to the opinion of the Court (358 U. S. 450, 463; 79 Sup. Ct. 357, 365; 3 L. Ed. 2d 421, 430); in addition, majority and minority of this Court, alike, expressed the view that both taxpayers there involved were engaged in interstate commerce exclusively notwithstanding that both maintained and channeled orders through local sales offices in the taxing jurisdictions.

In view of the widespread current speculation concerning the effects of this Court's decision in the *Northwestern Cement* case, *supra*, and concerning the extent of the protection against state and local taxation still afforded interstate business by the Commerce Clause, it is submitted that this is a question of public importance. It also involves a conflict among the highest courts of the states, on the point of what constitutes interstate commerce. The Supreme Courts of Minnesota and Georgia, in the *Northwestern Cement* case, and its companion case, had held those taxpayers to be engaged in interstate commerce. But the Supreme Court of Washington (in *U. S. Steel Corporation* v. *State of Washington*, 51 Wash. 2d 224, 316 P. 2d 1099, app. dism. 358 U. S. 38, 79 Sup. Ct. 39, 3 L. Ed. 2d 44 (1958)), and now, the Court of Appeals of New York, in this case, have both held that if a taxpayer engaged in selling goods across state lines maintains, and channels his orders through, a local sales office in the taxing jurisdiction, that fact is a sufficient basis to support local privilege taxes on the gross receipts of such sales, although the activities of the taxpayer in the jurisdiction are limited to the negotiation of such sales and incidental activities. With respect, it is sug-

gested that this question (which was not preserved in the Notice of Appeal in the *U. S. Steel* case [5]) should be clarified by the pronouncement of this Court.

The Third Question Is Substantial

The base of the tax to which appellant has been subjected under these statutes is that proportion of its gross receipts from sales of goods located and delivered outside the State of New York to purchasers located in New York City produced by the method of apportionment prescribed by the Comptroller in his Regulations (Appendix B, *infra*, p. 52); that is to say, that part of such receipts produced by applying against the total amount thereof whichever is the *greater* of:

(a) $33\frac{1}{3}\%$; or

(b) The average of

(1) The percentage of appellant's real and tangible personal property represented by such property located in New York City (for the years at issue, this varied from a low of $\frac{24}{100}$ of 1% to a high of $1\frac{52}{100}\%$;

(2) The percentage of appellant's wages paid represented by wages paid for services rendered in New York City (for the years at issue, this varied from a low of $\frac{85}{100}$ of 1% to a high of $2\frac{41}{100}\%$); and

(3) The percentage produced by a fraction, the numerator of which is appellant's gross receipts from intra-city sales plus a fixed $33\frac{1}{3}\%$ of its gross receipts from interstate sales touching the City, and the denominator of which is the total of appellant's gross receipts from intra-city sales plus its gross receipts from interstate sales touching the City. (Appellant had no intra-city sales; and therefore, apart

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[5] This appellant sought leave to file a brief *amicus curiae* in the *U. S. Steel* case, and suggested that the Court notice the point of its own motion; but the leave was denied, and the appeal was dismissed for want of a substantial Federal question.

from the fixed and arbitrary 33⅓% of interstate receipts, the numerator of this fraction was 0, and this percentage was 0%.)

For the years at issue, the average of these three percentages varied between a low of $\frac{72}{100}$ of 1% and a high of 1-$\frac{8}{100}$%; but for each of the years at issue, the apportionment actually applied was 33⅓%. The total taxes exacted from appellant, for the three years, amounted to $23,813.41. For the same years, a taxpayer engaged in intra-city business exclusively, and having receipts equal to those parts of appellant's receipts produced by the yearly averages of the three percentages, would have been taxed a total of $653.65, or less than one thirty-sixth as much.

The grossly arbitrary and discriminatory nature of this apportionment appears too obvious to require further comment; and that it is arbitrary was conceded by the New York court. That court, nevertheless, sustained the tax against appellant.

The basis of this decision is not entirely clear. Appellant had no intra-city receipts, and therefore it had no receipts includable in the tax base except those produced by operation of the apportionment itself. On no basis was appellant subject to this tax in any amount except as, and to the extent that, it was made subject by the apportionment. If, in these circumstances, the decision is that the arbitrary and discriminatory apportionment prescribed or permitted by these statutes does not invalidate the statutes or the tax, that decision is, we submit, contrary to the decisions of this Court in *Wallace* v. *Hines*, 253 U. S. 66, 40 Sup. Ct. 435, 64 L. Ed. 782 (1920)[6]; *New Jersey Bell Telephone Co.* v. *State Bd. of Taxes and Appeals*, 280 U. S. 338, 50 Sup. Ct. 111, 74 L. Ed. 463 (1930); *Cooney* v. *Mountain States Tel. and Tel. Co.*, 294 U. S. 384, 55 Sup. Ct. 477, 79 L. Ed. 934 (1935);

[6] And see *Davis* v. *Wallace*, 257 U. S. 478, 42 Sup. Ct. 164, 66 L. Ed. 325 (1922).

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365 (1938); and *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 59 Sup. Ct. 325, 83 L. Ed. 272 (1939). In each of those cases it was held that an arbitrary apportionment, or a lack of apportionment, invalidates the tax.

If, on the other hand (and despite the fact that the court referred to the apportionment as "the allocation formula of this tax law"), the decision is that the statutes authorize only "proper" apportionment, and that no improper apportionment was authorized, or could affect the validity of the statutes or the tax, exaction of the tax from appellant still violates the Fourteenth Amendment and the Commerce Clause. "When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law." *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239, 246; 52 Sup. Ct. 133, 136; 76 L. Ed. 265, 272 (1931). In the case at bar, as in the case just cited, the exaction was made by an officer of (a subdivision of) the state, in its name and for its use, in the course of performing his regular duties; the money is retained by the City and the judicial power of the State has been exerted in justifying the retention.

We submit that when appellant is taxed under these statutes on the basis of this apportionment, it is deprived of its property without due process of law, and denied the equal protection of the laws, and that its interstate commerce is subjected to discrimination and an undue burden.

The Fourth Question Is Substantial

On the basis that the tax was valid notwithstanding the arbitrary nature of the apportionment, and notwithstanding that appellant had no receipts subject to the tax except by operation of the apportionment itself, the New York court

held that appellant's contest of the apportionment came to no more than a contest of the measure, as opposed to the validity, of the tax; and, in so far as its complaint was based on the apportionment, appellant was denied relief in this action. Appellant's only right of redress, it was held, lay in pursuing the exclusive remedy provided in the statutes. (Admin. Code, Sec. B46-9.0, Appendix B, *infra*, p. 52.)

But without some method of apportionment prescribed by the Comptroller, the base of this tax is not stated; and, therefore, if, as the Court of Appeals held, the apportionment originally prescribed was invalid, or not authorized by the statutes, and inasmuch as no other apportionment applicable to appellant has ever been promulgated, the court, in holding appellant subject to this tax, must have construed these statutes to permit and empower the Comptroller, retroactively, and for the first time in or after 1959, to fix and determine whether any, and, if any, which, of appellant's receipts were subject to this tax imposed for the privilege, fully exercised eight to twelve years ago, of doing business in 1947, 1948 and 1951.

We submit that these statutes, construed to permit such retroactive determination of which interstate (but not which intra-city) receipts are subject to the tax, deny appellant the equal protection of the laws, discriminate against its interstate commerce, and deprive it of its property without due process of law. *Nichols* v. *Coolidge*, *supra*, p. 9; *Coolidge* v. *Long*, *supra*, p. 9; *Davis* v. *Wallace*, *supra*, footnote 6.

Further, we submit that these statutes, so construed, impose an undue burden on appellant's interstate commerce, and deprive it of its property without due process of law in that the same deny appellant any remedy against unconstitutionality thereof for any vice of apportionment. The

construction seems to be that, as one apportionment is found invalid, another may be substituted for it, and that the statutory command that the Comptroller act "properly" is sufficient to render these statutes, and the tax, immune to, and proof against, all constitutional attack founded in the apportionment.

Under the construction adopted, a taxpayer's only remedy against an arbitrary apportionment prescribed by the Comptroller is to seek judicial disapproval of that method; whereupon the Comptroller is still free to devise and prescribe another, and perhaps even more objectionable, method which would, in its turn, be subject to judicial review, but only as to the propriety of that last prescribed method. In its opinion herein, the Court of Appeals stated that, in the course of such judicial review, constitutional questions may be raised; but this can refer only to the constitutionality of the prescribed methods, as such, for the court held that the invalidity of a prescribed method of apportionment does not invalidate the statutes or the tax.

Not only does the statutory procedure deny any remedy against unconstitutionality of the statutes or the tax; it denies any adequate or practicable remedy against apportionments prescribed by the Comptroller. It would appear that only exhaustion of the taxpayer could terminate the otherwise endless process. In *Matter of Gulf Oil Corp. v. Joseph*, 307 N. Y. 342, 121 N. E. 2d 360 (1954), app. dism. 348 U. S. 923, 75 Sup. Ct. 339, 99 L. Ed. 724 (1955), a proceeding brought under the statutory remedy provisions, the Court of Appeals held the apportionment arbitrary and remanded the cause to the Comptroller to prescribe another, but unspecified, formula. Following this decision, appellant is advised, the Comptroller prescribed a new and different formula applicable to that taxpayer, but a formula deemed still arbitrary, and a formula now under review in the Appellate Division, on the second round, under the statutory procedure. Following the *Gulf*

of decision, the Comptroller also prescribed a new formula of general application effective for 1955 and subsequent years (Bulletin 1955-2 of Special Deputy Comptroller, Appendix B, *infra*, p. 54). In their brief before the Appellate Division in this case, appellees stated that "where the Courts have set aside the earlier formula and directed the use of a valid formula, the Comptroller has applied [this] new formula." But this new formula, although different, is as arbitrary as the old, in that (a) the *denominator* of the apportionment fraction is made to vary with variations in receipts from interstate commerce, so that the smaller the amount of such receipts, the greater the taxable proportion thereof, and (b) the numerator varies *inversely* with the amount of infra-city receipts, so that the smaller the amount of intra-city receipts, the greater the taxable proportion of interstate receipts.

We submit that the statutory remedy is illusory; and that, under the construction of these statutes adopted by the highest court of the State of New York, appellant is denied any remedy against unconstitutionality thereof, or of the tax, for arbitrary or discriminatory apportionment. We urge, therefore, that appellant is entitled to relief in this action. *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, 66 Sup. Ct. 445, 90 L. Ed. 358 (1946); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, *supra*, p. 18; *Wallace* v. *Hines*, *supra*, p. 17; *Cooney* v. *Mt. States Tel. and Tel. Co.*, *supra*, p. 17; *Gwin, White & Prince* v. *Henneford*, *supra*, p. 18.

CONCLUSION

It is respectfully submitted that the decision below is erroneous and in conflict with the decisions of this Court, and that the Federal questions presented are substantial and merit plenary consideration and redress by this Court.

Respectfully submitted,

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August, 1959.

APPENDIX A

1. Opinion of the Court of Appeals

BERKSHIRE FINE SPINNING ASSOCIATES, INC.,
Appellant,

v.

CITY OF NEW YORK et al.,
Respondents.

Argued January 20, 1959; decided March 12, 1959.

DESMOND *J.*:

This suit was brought for a declaratory judgment that the New York City General Business and Financial Tax Laws (Administrative Code of City of New York, § B46-2.0 Subd. a; see Enabling Act, General City Law, § 24a) are, if and as applied to plaintiff, unconstitutional because plaintiff's New York City activities constitute interstate commerce exclusively. As further relief plaintiff demanded judgment for $23,813.41 in refund of such taxes paid to the city by plaintiff under protest for the years 1947, 1948 and 1951. At Special Term each side moved for summary judgment in its favor and plaintiff was granted all the relief it had prayed for. However, the Appellate Division reversed and dismissed the complaint.

The problem is a familiar one. Are plaintiff's New York City activities so substantial and separable from its interstate commerce as to be subject to this local tax? A negative answer will end the lawsuit and give plaintiff judgment. An affirmative answer will leave unanswered further inquiries as to whether the allocation formula of this tax law (see Administrative Code, § B46-11.0, subd. 8, and

City Comptroller's Regulations, art. 211) as applied to plaintiff is arbitrary and discriminatory and, if so, whether relief as to that can be granted in a plenary action like this one.

The facts are undisputed. Plaintiff is a Massachusetts corporation with its principal business and executive office in Providence, R. I., authorized to do business in New York State (but holding no corporate meetings here) and engaged in manufacturing textile fabrics and curtains in factories outside this State. All plaintiff's receipts come from the sale of those fabrics and curtains. One of plaintiff's out-of-State offices arranges for the purchase of cotton in the South, then has the cotton shipped to plaintiff's factories in Rhode Island, Massachusetts and Vermont from which plaintiff ships out to its customers in various States greige goods (unbleached fabrics) and curtains and curtain materials. Some of the unbleached fabrics are sent for refinishing by plaintiff to dyeing plants (some of them in New York State) owned by others, where the greige goods are dyed or printed as required by accepted orders from plaintiff's customers. In New York City plaintiff has two separate offices, one in the "curtain trade district" and one in the "textile district". A vice-president of plaintiff supervises both offices and is head also of its finished goods department. Under him are two other vice-presidents, each managing one of the two New York City offices. The New York offices employ altogether about 90 people (out of its total force of 8,500 people) of whom 20 or so are salesmen, the rest being clerks, receptionists, telephone operators, a credit manager, etc. The rent for the two New York City offices runs to about $50,000 a year. Plaintiff has no factory, warehouse or store in New York State, keeps no stock of goods in this State and owns no property here except the furnishings of its New York City offices.

The functions of plaintiff's New York City offices and staff are well described in its own complaint in this suit as

follows: "to maintain contact with the trade by soliciting established and prospective accounts; to receive, and to reject, modify or accept, offers to buy; to forward accepted offers to one of plaintiff's plants or warehouses outside the State of New York to be filled; to perform credit investigations and functions; to make up and dispatch invoices of sales of finished goods, but not of greige goods or curtains; and, to receive and deposit payments from customers." Plaintiff's New York City salesmen take from prospective customers and submit through their department heads to one of the New York City vice-presidents oral proposals to buy plaintiff's goods (the minimum order is for 3,000 yards). If the price offered by the customer is up to plaintiff's established price and the order is of a size which does not create special production problems, the offer is accepted and a contract entered into by plaintiff's New York City personnel without further reference to plaintiff's other offices or factories. If there is doubt in the minds of New York City personnel as to adequacy of the price offered or as to availability of the goods, there is consultation between the New York City and Providence offices. If the doubt is resolved, the offer is accepted by means of a contract made and signed for plaintiff at and by the New York City office (except that in some instance the customer by preference uses his own purchase form which is accepted by plaintiff at New York City). No goods, however, are shipped from anywhere in New York State to any customer anywhere. Goods are shipped f.o.b. out-of-State points.

In addition to its 20 salesmen working in New York City, plaintiff has other salesmen in other parts of the United States. Purchase offers obtained by those out-of-State salesmen are sent by them to one of the two New York City offices and thereafter the offers are processed at New York City just like the offers which originate in New York City. All checking of a customer's credit is done at New York City and no orders are accepted until the credit

has been approved by the credit manager and his employees at one of the New York City offices. All plaintiff's sales records and its accounts with its customers are kept at the New York City offices as is an inventory of all plaintiff's goods wherever located. All payments for goods sold are received and banked in New York City but billing to customers for greige goods only is from Providence.

Plaintiff's brief asserts that its "sole and only activity in the City, or the State, of New York consists of the negotiation of such interstate sales." However, the record shows activities going much beyond or outside sale negotiating. Plaintiff's principal vice-president in New York City, a Mr. Kennedy, not only has charge of the selling of all plaintiff's finished goods but supervises a department in New York City which creates designs and purchases designs for fabrics. Also, on the basis of information as to trends brought in by his salesmen, Kennedy gives directions to Providence as to colors and amounts of various dyeings. The New York City offices, in response to the discovered demands of the market, instructs Providence as to "the type of fabrics that we (New York) wished to be made". The New York City curtain trade office similarly gives instructions direct to plaintiff's curtain factory in Warren, Rhode Island; to manufacture more of certain curtain material when the inventory record kept at New York City showed an insufficient amount of that material on hand. The New York City offices carry on other incidental activities such as placing advertising in trade publications and making adjustments or settlements on at least some complaints of customers.

Is there anything in all this "that can be regarded as a local business as distinguished from interstate commerce" (*Chemung Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 153-154)? Or is plaintiff's local activity "such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it" (*Michigan-Wis-*

consin Pipe Line Co. v. *Calvert*, 347 U. S. 157, 166)? The applicable rule of law is old and simple to state but less simple to apply. A local privilege tax like that of New York City may not be imposed upon interstate sales or solicitations by an interstate business (*Matter of United Piece Dye Works* v. *Joseph*, 307 N. Y. 780, cert. denied 348 U. S. 916). Mere local "drumming up" of orders does not without more authorize local taxation of the transaction when the goods are located and delivered in another State (*Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 537). On the other hand, the local authorities may validly tax the privilege of doing business locally if the local business operations though related to interstate movements of goods extend substantially beyond the sale and promotion of the products and include a "local incident" which is "sufficient to bring the transaction within its taxing power" (*Norton Co.* v. *Department of Revenue*, *supra*, p. 537).

Scores of decisions are cited to us by the parties but to reach decision on this phase of the case we will examine three only of those cited cases. The first is *Matter of United Piece Dye Works* v. *Joseph* (282 App. Div. 60, aff'd. 307 N. Y. 780, *supra*). United was a New Jersey corporation which at three plants (none of which was in New York State) dyed, printed and finished fabrics owned by others and which were received by United from its customers' textile mills, all of which were outside the State. After its operations on the fabrics were completed, United shipped the goods back to the customers, sometimes at New York State points. In New York City United had a sales, promotional and clerical staff. The sales representatives carried about and showed to prospective customers samples of the work done at the out-of-State dyeing plants of United and furnished other information as to United's services. The *United Piece* case record makes it clear that the New York office did no more than "solicit or promote". Sales

and contracts were never consummated in New York nor were bills sent from there or payments received there. The New York courts held that United conducted no separable business, the privilege of doing which could be locally taxed.

Next (but out of chronological order) we consider the *Norton v. Department of Revenue* case (340 U. S. 534 [1951], *supra*) which involved an Illinois privilege tax on selling tangible personal property in Illinois, expressly exempting "business in interstate commerce". The Illinois operations of the Norton concern, a Massachusetts corporation, were diversified. Its over-the-counter retail sales from local stock were, of course, locally taxable. Similarly, it seems, the local tax was held by the courts to be due on sales of goods ordered through the Chicago store but delivered not from the Illinois stock but direct from Massachusetts to the Illinois buyers. As to sales of goods not carried in Illinois stock but shipped into Illinois to fill orders sent direct to Massachusetts by Illinois customers and so not "generated" by Norton's local services, the Supreme Court held "interstate commerce" and exempted these from the tax. A controversial class of Norton sales was of goods not carried in stock by it in Illinois but sent and delivered through the Chicago store. This last class of sales, also, was held by the Supreme Court to be subject to the Illinois privilege tax. In the *Norton* opinion the Supreme Court, restating the rule as generally understood, made this statement (*supra*, p. 537): "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable." Since Norton employed no Illinois solicitors or traveling salesmen it seems obvious that the "local incident" which justified local taxa-

tion as to that last-described group of sales was the maintenance in Illinois of the local office or store and the services it rendered in bringing about or completing those sales. Wrote the Supreme Court in *Norton* (*supra*, p. 538): "Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market."

The third and last of the three cases we analyze is *Field Enterprises* v. *State of Washington* (352 U. S. 806 [1956]) where the Supreme Court affirmed the Washington State courts (47 Wn. [2d] 852) in holding Field's book sale business to be subject to the State "business and occupation tax". In *Field*, the United States Supreme Court wrote no opinion beyond the citation of the *Norton* decision (*supra*). But the absence of a full opinion does not make *Field* any less controlling an authority (see speech of Justice HARLAN, Record of Association of Bar of City of New York, Vol. 13, pp. 541, 546). The facts of the *Field* case are set out in the Washington Supreme Court's opinion. Field is a Delaware corporation with its principal office in Chicago and a divisional office in Seattle, staffed by two managers and clerks and bookkeepers. The Seattle district controlled operations in several States and employed a large number of salesmen of whom about 30 worked full time in the State of Washington. The sales were of sets of educational books, the stocks of which except necessary samples were maintained outside Washington. The salesmen solicited prospective customers and when successful procured signed order forms which were subject to acceptance in Chicago. The salesmen sent the form and a down payment (or full payment) to Chicago where the order was accepted or rejected. Field's activities were held by the courts to be subject to the Washington State privilege tax which, like New York City's, is measured by gross receipts.

There are, of course, factual differences between *Norton* and *Field* (*supra*) and between *Field* and the present case.

But the differences favor taxability here, since the local New York City activities of the present plaintiff considerably exceed the local activities in *Norton* and *Field* and include a substantial measure of control by plaintiff's officials in New York City of production, contracting, shipment and credit. We conclude that the Appellate Division was correct in this case in holding that the imposition on plaintiff of this New York City tax did not violate the Interstate Commerce Clause of the Federal Constitution.

Plaintiff argues, as did the dissenting Justices in the Appellate Division, that this is in effect an overruling of the comparatively recent *Matter of United Piece Dye Works* v. *Joseph* (307 N. Y. 780, cert. denied 348 U. S. 916, *supra*). The Supreme Court did not affirm in *Matter of United Piece Dye Works* but denied certiorari only. But the more persuasive answer to the argument from the *United* case is that the facts of that situation went no further than mere "drumming up business", while here there are separable "local incidents" consisting of important services before and after sale and shipment of the goods.

After the argument herein, the United States Supreme Court, on February 24, 1959, handed down an opinion in two cases consolidated for decision: *Northwestern States Portland Cement Co.* v. *Minnesota* and *Williams* v. *Stockham Valves & Fittings* (—— U. S. ——). The decision upheld the validity of apportioned State net income taxes upon companies engaged exclusively in interstate commerce in the taxing States. We find nothing in that decision requiring any change in the conclusions now reached by us in the present case.

Plaintiff argues (and cites section 22 of article III of the New York State Constitution in support) that the statute imposing this New York City General Business Tax is unconstitutionally vague and represents an unconstitutional delegation of legislative power. The cited provision of the New York State Constitution does not apply

at all to local taxes (see *Matter of McPherson*, 104 N. Y. 306; *Jones* v. *Chamberlain*, 109 N. Y. 100, 109). Plaintiff's other charges of unconstitutional vagueness and delegation of power have been rejected by this court as to this very tax in *Olive Coat Co.* v. *City of New York* (283 N. Y. 733) which decision followed *Matter of Western Elec. Co.* v. *Taylor* (276 N. Y. 309; see, also, *Matter of New Yorker Mag.* v. *Gerosa*, 3 N. Y. 2d 362, 369, appeal dismissed 356 U. S. 339). The same result was reached in the later litigation between Olive Coat Company and the City Comptroller (reported at 287 N. Y. 769). Accordingly, these questions are no longer open in this court.

Finally, appellant asserts that the allocation formula applied by the City Comptroller to plaintiff's combined receipts produces an arbitrary and unreasonable result in that it taxes plaintiff's one third of whole gross receipts from its general interstate business whereas, according to plaintiff, only about 1% of its tangible property is within New York City and only some 2% to 3% of its total annual wage and salary budget is paid for services rendered to it by its officers and employees in New York City. Generally, plaintiff's contention in this respect is the same as that made by the taxpayer in *Matter of Gulf Oil Corp.* v. *Joseph* (307 N. Y. 342) where this court rejected as arbitrary and contrary to legislative intent the use of the 33⅓% minimum which the Comptroller applies in these cases by use of the allocation formula set out in article 211 of his regulations (see Administrative Code of City of New York, § B46-11.0, and see our opinion in the *Gulf Oil Corp.* case, *supra*). However, plaintiff's insuperable difficulty at this point is that his attack on the amount of the tax and the correctness of the formula for arriving at it cannot be litigated in a plenary suit like the present one. The sole remedy for relief from incorrectness of allocation formula or the application thereof is a proceeding under article 78 of the Civil Practice Act, not by action (Admin-

istrative Code, § B46-9.0; *Lewis* v. *City of Lockport*, 276 N. Y. 336; *Olive Coat Co.* v. *City of New York*, 283 N. Y. 733, *supra*; *Cooper Union* v. *City of New York*, 298 N. Y. 578; *Excelsior Oil Co.* v. *City of New York*, 4 A D 2d 937, motion for leave to appeal denied 4 N Y 2d 675). As to the New York City sales tax we held many years ago in *Dun & Bradstreet* v. *City of New York* (276 N. Y. 198, 206) that "where taxing officers have jurisdiction, their acts are not void for mere error * * * but can only be reviewed in the manner provided by statute" (see *Rockland Light & Power Co.* v. *City of New York*, 289 N. Y. 45). Since this general business tax applies on its face and not unconstitutionally to plaintiff's New York City activities, no reason appears why plaintiff to contest the amount of the tax or the formula for determining the amount should have any relief except that provided for within the statute itself (see *Richfield Oil Corp.* v. *City of Syracuse*, 287 N. Y. 234, 242). A taxpayer may and frequently does (see *Matter of New Yorker Mag.* v. *Gerosa*, 3 N Y 2d 362, *supra*) raise in an article 78 proceeding all possible questions of constitutionality, applicability, correctness of formula and of tax.

The judgment should be affirmed, with costs.

Chief Judge Conway and Judges Dye, Fuld, Froessel, Van Voorhis and Burke concur.

Judgment affirmed.

2. Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 12th day of March in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk

REMITTITUR March 12, 1959.

2. Judgment of the Court of Appeals

No. 347

BERKSHIRE FINE SPINNING ASSOCIATES, INC.,
Appellant,

vs.

CITY OF NEW YORK, & ORS., &C.,
Respondents.

BE IT REMEMBERED, That on the 18th day of November in the year of our Lord one thousand nine hundred and fifty-eight, Berkshire Fine Spinning Associates, Inc., the appellant—in this cause, came here unto the Court of Appeals, by Robinson & Henson, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And City of New York, & ors., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Charles H. Tenney, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Truman Henson, of counsel for the appellant, and by Mr. Stanley Buchsbaum, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

Appendix A—Judgment of the Court of Appeals

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York

Court of Appeals, Clerk's Office)
Albany, March 13, 1959.)

(Seal)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

3. Prevailing Opinion of the Appellate Division

BERKSHIRE FINE SPINNING ASSOCIATES, INC., Respondent, v. CITY OF NEW YORK et al., Appellants.

First Department, July 3, 1958.

M. M. FRANK, J. In this action for a declaratory judgment, the defendant, the City of New York, appeals from an order which denied its motion for summary judgment and from the summary judgment entered in favor of the plaintiff. Special Term decided that the New York City General Business and Financial Tax Law * was unconstitutional insofar as it applied to the plaintiff's activities in New York City, and that the tax levied against it was invalid. The plaintiff was awarded a refund of the tax assessments for the years 1947, 1948 and 1951, which had been paid under protest. The judgment necessarily imported the finding that the plaintiff was exclusively engaged in interstate commerce and that its local activity was *de minimis*.

Although the plaintiff posed a second issue when it also attacked the validity of the tax upon the ground that the formula adopted by the comptroller was arbitrary and discriminatory, Special Term was not required to reach the question in view of its determination. Nor can we pass upon it, unless it is reached upon a reversal of the first issue raised.

As authorized by the New York State Enabling Act, the defendant imposes a gross receipts tax for the privilege of doing business in New York City. The applicable allocation formula under which the plaintiff paid the tax for the years in question was promulgated by the comptroller

* The City of New York imposes a gross receipts tax for the privilege of doing business in New York City (Administrative Code of City of New York, § B46-2.0, subd. a). The tax is authorized by the New York State Enabling Act (General City Law, § 24-a

of the City of New York pursuant to the power granted to him under the Administrative Code (Comptroller's Regulations, art. 211).

Whether the local functions of a foreign corporation are merely incidental to its activities in interstate commerce or whether they are of such a character as to enable it to establish itself in and hold the community market, thereby subjecting it to the local tax, is most frequently a fact question. With that in mind, an analysis of the local activities of the plaintiff is appropriate.

As culled from the complaint, the affidavits submitted by the plaintiff and the examination before trial of its officers, the facts immediately following are undisputed.

The plaintiff, a Massachusetts corporation, authorized to do business in the State of New York, never held a stockholders' or directors' meeting in New York City.

It sold textiles consisting of greige goods (textiles in unfinished and unbleached state), finished fabrics, curtain materials and curtains, all of which it manufactured in plants located in Rhode Island, Massachusetts and Vermont. It had offices in Providence, Rhode Island, through which it purchased cotton in the South for shipment to those of its factories where the raw cotton was processed and woven into greige goods. With some exceptions, hereinafter noted, the manufacturing skill, and the required plant direction and supervision were provided either at the plaintiff's Providence office or at its factories.

The plaintiff maintained two separate offices in New York City, strategically located for the customers that each served. The one catering to the curtain trade was located at 261 Fifth Avenue and the other, in the Worth Street textile area, dealt with cotton goods. (Since both were operated as an integrated unit, we shall refer to them in the singular.) The New York City office was supervised by 3 vice-presidents, and employed some 85 to 95 people, including salesmen, clerical personnel, a credit manager and

other administrative clerical personnel. The salesmen obtained orders in the form of oral proposals to buy, which first were delivered to their department heads and then transmitted to the vice-president in charge of the division involved. When customers agreed to pay the prices previously set for the goods and the orders created no production difficulties, the New York City office entered into contracts of sale. Only if a large order involved problems of availability of goods, production schedules, or a price less than the established one, would the Providence office or the mills be consulted, but in any case, the New York office closed the contract. Orders or proposals obtained by salesmen assigned out of State were processed in the same manner by the New York City unit, except that the transactions were conducted by mail.

No orders or contracts were accepted unless the credit of the customer had been checked and approved by a credit manager stationed in New York City. His powers and duties, and those of the personnel under his supervision, included the exercise of definitive discretion in approving orders from delinquent accounts, in accepting orders on a cash basis only, in withholding shipments to delinquent debtors, and in prohibiting further solicitation of business from customers no longer deemed desirable.

The New York office maintained all records and ledgers concerning sales and also processed the perpetual merchandise inventory records, which included all data of goods in process of manufacture and in transit. It maintained complete record control of shipments, in part comprising directions to the mills as to the time when and the place where deliveries to customers were to be made. Finished goods, constituting the bulk of the plaintiff's business, were billed from the New York office, whereas greige goods were billed from Providence.

Payment for merchandise sold was received in New York and deposited in New York City bank accounts, and

employees in the local office were authorized to and did draw upon these accounts, although the plaintiff had other accounts in Providence and Boston banks.

The local office exercised substantial and considerable control over production. Mr. Kennedy, one of the plaintiff's vice-presidents stationed here, supervised a designing unit which purchased and developed designs for printed textiles, and he made decisions with respect to dyeing, printing, and other methods of finishing goods. The officers employed in the local office would estimate and determine future production requirements and direct employees in the Providence office as to the types of fabrics to be processed.

The authority of the New York office with respect to finished curtain materials was even more extensive, for in this division the instructions from New York were not channeled through Providence but were sent via closed circuit teletype directly to factories in Warren, Rhode Island.

Customer complaints, claims of merchandise defects or non-conformance with samples were processed through the New York office, as were the advertising and promotional activities.

From the complaint, it appears that the annual wages and salaries for services rendered in the City of New York between 1947 and 1953 ranged in progressively increasing scale from $139,000 to $592,000. While these items were small percentagewise, in comparison with the total payroll, which included all factory labor costs, they do indicate expenses that exceeded those attributable solely to sales and promotion.

The tax return for 1947, filed by the plaintiff, valued average merchandise inventory in New York City at $193,356.26 and the returns for subsequent years valued this item from a high of about $115,000 to a low of $6,500. Thereafter, an affidavit by one of the plaintiff's accountants ex-

plained that the situs of this merchandise was not actually the city but independent finishing plants in New York State. Even if full credit is accorded the explanation, it would still be a fair inference that the merchandise so inventoried was charged to the New York office.

Based upon these local activities, the city imposed an apportioned gross receipts tax on the plaintiff for the privilege of doing business in New York City.

Upon the facts, it is evident that the plaintiff's local business operations extended substantially beyond the sale and promotion of its products. Its designs were prepared in New York City, after study of the local market indicated the desirability of colors, patterns and other items to be considered in the effort to competitively sell printed and finished goods. The directions for the manufacturing of goods for future sales and delivery given to the Providence office and to company plants, the checking of credits, the approval or withholding of shipments after sales were made and the maintenance of records which served to control production, save for the mechanical performance of manufacturing, all these require the rejection of the conclusion that this plaintiff "stayed at home".

While it may be reasonably argued that some of the activities hereinbefore outlined were merely incidents in the transacting of interstate business, they should not be isolated from the total. It is a fair inference that all of the local activities were either necessitated by or designedly planned for the express purpose of vying advantageously with local competitors.

It is implicit in *Field Enterprises* v. *State* (47 Wn. [2d] 852, affd. 352 U. S. 806) and affirmatively stated in *Norton Co.* v. *Department of Revenue* (340 U. S. 534) that the taxpayer has the burden of proof in seeking to establish the invalidity of a tax such as is involved here. (See, also, *Compania General* v. *Collector*, 279 U. S. 306, 310; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 316, affg. 271 N. Y. 353, which was a cert. proceeding.) That requirement

appears reasonable upon analysis. As between the agency empowered to impose the tax and the taxpayer, the latter is in an infinitely better position to establish the factual proof with respect to the operative factors involved in the conduct of the business. To be relieved from the requirement to pay the tax levied, it is incumbent upon the taxpayer to establish the facts upon which the exemption is to be predicated. Moreover, the Administrative Code of the City of New York (§ B46-3.0) places the burden of proof upon the taxpayer. To what extent the comptroller may inquire in a hearing upon the filing of a protest to the tax laid, is not before us, but it is evident that in a plenary action, if he is to be restricted in his investigation of the facts surrounding the conduct of a business upon which a tax is levied, the taxpayer would be the beneficiary of an undue advantage.

If the plaintiff's activities in New York City were confined to solicitation of business and promotion, including such minutiae identified with those activities as *in toto* "do not extend beyond 'drumming' up business", we would not hesitate, following *Matter of United Piece Dye Works* v. *Joseph* (282 App. Div. 60, 64, affd. 307 N. Y. 780, cert. denied 348 U. S. 916), to hold that the tax imposed was unconstitutional. But it is our considered view that the facts in this case are so markedly incomparable to those in *United Piece Dye Works* that our decision in that case is inapplicable here.

The decisions of the United States Supreme Court leave within varying degrees clarified and limited the power of local governments to levy a tax for the privilege of carrying on business (*Western Live Stock* v. *Bureau*, 303 U. S. 250; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123; *Spector Motor Service* v. *O'Connor*, 340 U. S. 602; *Norton Co.* v. *Department of Revenue*, 340 U. S. 534; *Field Enterprises* v. *State*, 352 U. S. 806, affg. 47 Wn. [2d] 852; *McLeod* v. *Dilworth Co.*, 322 U. S. 327).

"If the local activities of a vendor are merely incidental to conduct of transactions essentially in interstate commerce and "forming an unbroken process of interstate commerce", then the imposition of the local tax is tainted with illegality; conversely, however, if the vendor, as here, engages in activities designed essentially and exclusively for the local buyer then an apportioned tax is permissible. Perhaps the best analysis for our purpose is that made by the Supreme Court in the *Norton* case (340 U. S. 534, 537, *supra*), when it said: "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable."

Taxation of a local business whose activities are substantial and separable from the transportation which is in interstate commerce is not forbidden so long as the tax is fairly apportioned (*Western Live Stock* v. *Bureau*, 303 U. S. 250, *supra*). When all of the plaintiff's operations from beginning to end are considered, it becomes reasonably clear that its local activities rendered integrated services of which the manufacturing of textiles was merely a part. By channeling business through its New York office, the plaintiff gained the advantage of a local business. This was a local activity which went beyond the solicitation of business exclusively in interstate commerce for it included services rendered to its customers before and after shipment of the goods.

When the statement of facts in *Field Enterprises* v. *State* (47 Wn. [2d] 852, *supra*) is considered in conjunction with the undisputed facts in this case, the affirmance of the validity of the tax imposed on Field by the United States Supreme Court (352 U. S. 80, *supra*) becomes dispositive of the issue here.

On this record, we must hold as a matter of law, that the plaintiff's local activities were substantial and separable from those in interstate commerce and that it was subject to the tax levied. That being so, we reach the second problem posed.

The plaintiff contends that the allocation formula applied to it was arbitrary and discriminatory and therefore invalid. Assuming that the plaintiff is correct in its contention, we cannot, in this plenary action, afford it any relief.

It is now certain that the appropriate remedy for relief from an allocation formula promulgated by the comptroller in levying the New York City General Business and Financial Tax, is by protest to the comptroller, and upon his refusal to give relief, by the commencement of an article 78 proceeding (see *Matter of Gulf Oil Corp. v. Joseph*, 307 N. Y. 342; *Matter of Olive Coat Co. v. McGoldrick*, 287 N. Y. 769; *Olive Coat Co. v. City of New York*, 283 N. Y. 733; *Matter of McCall Corp. v. Gerosa*, 2 A. D. 2d 358). That the abbreviated time limitation for the commencement of an article 78 proceeding bars the plaintiff from relief, furnishes no justifiable reason for the courts to sanction a plenary action in the absence of express legislation (*Przybyrowski v. O'Connell*, 272 App. Div. 1096, aff'd 297 N. Y. 940; *Colodny v. New York Coffee & Sugar Exch.*, 4 A. D. 2d 137, aff'd, 4 N. Y. 2d 698; *Gorham Mfg. Co. v. Tax Comm.*, 266 U. S. 265).

In sum, upon this record, it is our opinion that the plaintiff has failed to present a triable issue as a matter of law. The order and judgment below should be reversed on the law, the motion of the plaintiff for summary judgment denied and the cross-motion of the defendants for a dismissal of the complaint granted. Costs to appellants.

4. Dissenting Opinion of the Appellate Division

BREITEL, J. (dissenting). It is not wise to substitute complex factual distinctions for standards heretofore applied in determining local privilege taxation to foreign corporations engaged in interstate transactions. To do so threatens discriminatory and even arbitrary treatment of the many interstate corporations present in this State and city. Moreover, it would engender a new spate of privilege tax litigation resulting in an extended period of uncertainty for tax collectors and taxpayers.

The Supreme Court of the United States, of course, delimits for the States the standards to be applied in determining local taxation of enterprises moving in interstate commerce. This it has done in many holdings applying the elaborated rationale of the Commerce Clause. If the existing standards have any validity, then the transaction of plaintiff corporation occurring in New York are interstate in character. And as such, they do not subject the corporation to local privilege taxation, however much the corporation may be subject to other forms of local taxation. On this view, the conclusion to this case is predetermined by *Matter of United Piece Dye Works* v. *Joseph* (282 App. Div. 60, aff'd 307 N. Y. 780, cert. denied 348 U. S. 916).

If new standards are to be applied, and maybe they should, then the principles as expressed in the *United Piece Dye Works* case should be abandoned and the case frankly and explicitly overruled. The situation here cannot be distinguished from that in the *United Piece Dye Works* case under recent relevant standards. True, plaintiff has a more elaborate sales organization, with many more employees and many more executives in this State. There are also many elements of local supervision present, so cogently indicated in the majority opinion. Generally, then, plaintiff has a more extensive office and more personnel in this State —servicing sales, credit, design, limited production and inventory control, and claims—each associated generally

with the solicitation of orders and sales of merchandise in the New York market from goods manufactured outside the State. (Nevertheless, even these New York incidents constitute but a minute portion of the widespread business operations of this large textile corporation—employing as it does 8,500 persons, and doing a business of over $74,000,000 in 1947. On the other hand, in the *United Piece Dye Works* case, the taxpayer received 95% of its orders from the New York City market. But such quantitative analysis of sales activity is not the measure of localization of enterprise for purposes of privilege taxation (see *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, particularly in the light of the separate dissents by Mr. Justice Reed and Mr. Justice Clark).

One circumstance present in this case and not present in the *United Piece Dye Works* case is that many of the agreements of sale were closed in this State. This circumstance alone has never been made a basis for local privilege taxation (see, e.g., Powell, "New Light On Gross Receipts Taxes", 53 Harv. L. Rev., 909). Rather, the prime, albeit not the exclusive, "taxable event" has been the delivery—the transfer of possession—in the taxing State. And the facts here are quite clear that all deliveries were f.o.b. the seller's out-of State mills (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33). Should the Supreme Court eventually hold, as it well might, that the closing of the sales agreement standing alone is a proper standard for determining subjection to local privilege taxation the case would of course, be on an entirely different bottom.

The decision of the Supreme Court in *Field Enterprises* v. *State* (352 U. S. 806) presents a problem. In that case there was no elaboration of the court's reasoning. It is therefore impossible to say what was the Commerce Clause basis for the affirmance of the State judgment. Adding to the difficulties is that the affirmance was solely on an ex parte statement of jurisdiction filed, without argument,

pursuant to rule 12 of the Rules of the Supreme Court of the United States. On this slender ex parte presentation barely outlining the issues, the Supreme Court affirmed, two Justices noting probable jurisdiction. In the *Per Curiam* opinion, only a few lines long, the court cited *Norton* v. *Department of Revenue* (*supra*). But this citation casts little light on the question with which the Supreme Court then and this court now is concerned. (At least one commentator has been similarly troubled. Strecker, "'Local Incidents' of Interstate Business," 18 Ohio St. L. J. 69.)

If in fact the affirmance in the *Field* case means that the Supreme Court adopted the views of the Supreme Court of the State of Washington, then, clearly, more is required here than distinguishing the facts in this case from those involved in the *United Piece Dye Works* case. For the fact complex in the *Field* case, if it had occurred here, would, under the rulings in this State, require a holding that Field Enterprises had never become localized sufficiently to allow local privilege taxation. The reverse would also be true: If the *Field* case affirmance means all that it potentially means, then the *United Piece Dye Works* case was wrongly decided, despite the denial of certiorari by the Supreme Court.

Consequently, if the *Field* case is to be viewed as the city urges, then this court should simply overrule the *United Piece Dye Works* case. Such a result would allow the State and city to impose with rational uniformity local privilege taxation on all foreign corporations where the selling transactions are so extensive within the State as to amount to affording a "local grip" on the seller by the taxing unit. Then, too, the converse expression of the test might be whether the services provided in the local office were "decisive factors in establishing and holding" the local market (see *Field Enterprises* v. *State*, 47 Wn. [2d] 852, 856, aff'd 352 U. S. 806; cf. *Norton* v. *Department of Revenue*, *supra*, *United Piece Dye Works* v. *Joseph*, *supra*,

see dissenting opinion by CALLAHAN, J., where this tenable view was forcefully taken, but rejected in this court and in the Court of Appeals).

Before, however, the State courts should effect so drastic a reversal of position, it would seem wiser to await clearer direction from the Supreme Court. In the light of the history of the *Field* case before the Supreme Court, there is not sufficient basis for erecting, in the State courts an entirely new set of principles with economic and legal ramifications unexpressed, to be implied only at the peril of great economic and governmental uncertainty.

In view of the holding by the majority, and the view taken here, it is not necessary to discuss at any length the question raised as to the allocation formula and the remedy available. The question is novel and important. There is no authority to support the view that the statutory remedy is the exclusive one, as distinguished from being merely available, where the allocation formula is invalid. Assuming that the making of the allocation formula is the exercise of a quasi-legislative function by the comptroller it raises no different problem than one created by an unconstitutional statute. If that be so the plenary remedy would be available (see *Mercury Mach. Importing Corp. v. City of New York*, 1 A. D. 2d 337, 339, revd. on other grounds 3 N. Y. 2d 418, and the authorities cited therein). The statutory remedy would then fall with the statute as extended by the discriminatory formula and made invalid thereby.

Accordingly, I am constrained to dissent and vote to affirm the judgment and order granting plaintiff summary judgment and to affirm the order denying defendants' motion to dismiss the complaint for insufficiency.

RABIN and MCNALLY, JJ., concur with M. M. FRANK, J.; BREITEL, J., dissents and votes to affirm in opinion, in which, BOTEIN, P. J., concurs.

5. Opinion of Supreme Court, New York County

BERKSHIRE FINE SPINNING ASSOCIATES, INC., Plaintiff, v. CITY OF NEW YORK et al., Defendants.

Supreme Court, New York County, October 21, 1957.

BENEDICT D. DINEEN, J. Plaintiff moves for summary judgment to declare that the General Business and Financial Tax Laws of the City of New York (Administrative Code of City of New York, § RR41-1.0 *et seq.*; § B46-1.0 *et seq.*) do not apply to the plaintiff and that if the said laws do apply the same are unconstitutional. Plaintiff is a Massachusetts corporation engaged in manufacturing textile piece goods and curtains and sells at wholesale. It is authorized to do business in the State of New York and maintains two offices in the city of New York. Working out of these offices are three vice-presidents, a clerical staff and salesmen totaling approximately 95 employees. These officers and employees are engaged in such activities within the city of New York by reason of which the defendants claim makes them subject to be taxed at least in part. The manufacturing processes, packing and shipping are all performed outside the State. The local activities, though numerous and varied, form an integral part of the plaintiff's business. Such activities are not separate and distinct and are related to the interstate business carried on by the plaintiff and cannot be isolated from such business.

The activities are incidental and related to the interstate operations of the plaintiff and as such are not subject to local taxation even if orders for goods to be shipped from outside the State are obtained (*Matter of United Piece Dye Works v. Joseph*, 282 App. Div. 60). The authorities cited in the briefs submitted lead to the conclusion that none of the activities engaged in by the plaintiff can be characterized as local in nature so as to be taxed by the de-

fendants, but are component parts of interstate commerce. Such conclusion obviates the necessity to consider the allocation formula as applied to the plaintiff. However, there remains a further question as to the amount sought to be recovered by the plaintiff. Payments were made for the years 1947 to 1951, inclusive. Payments for the years 1949 and 1950 were made without any reservation or protest. Such amounts cannot be recovered, having been made voluntarily and knowledgeably (*Mercury Mach. Importing Corp. v. City of New York*, 1 A D 2d 337). Motion granted in accordance herewith.

Settle order.

APPENDIX B

Statutes and Regulations Involved

GENERAL CITY LAW, ARTICLE 2-B—GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

"24-a. * * *

"* * * any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business or making sales within such city, measured by the gross receipts from such activities carried on or sales made within the city, * * *. Every such local law in terms shall be, substantially, as follows:

* * *

"2. Imposition of tax. a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales within such city, during each year, * * * every person shall pay an excise tax * * * upon all receipts received in and or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year * * *.

"b. Where a receipt in its entirety cannot be subjected to the tax imposed by this local law, by reason of the provisions of the Constitution of the United States or any other provision of law, the chief fiscal officer shall establish rules and regulations and or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The chief fiscal officer may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of

the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision b.

"§ 6. * * * The determination of the chief fiscal officer shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act * * *.

"§ 7. * * * After making his determination the chief fiscal officer shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the civil practice act to review such determination * * *.

* * *

"§ 9. Remedies exclusive. The remedies provided by sections six and seven of this local law shall be the exclusive remedies available to any person for the review of tax liability imposed by this local law; * * *.

* * *

"§ 11. General powers of the chief fiscal officer. In addition to the powers granted to the chief fiscal officer in this local law, he is authorized and empowered:

* * *

"8. To prescribe methods for determining allocations of receipts to the city."

NEW YORK CITY ADMINISTRATIVE CODE.

"Sec. B46-6.0. * * * The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act * * *.

"Sec. B46-7.0. * * * After making his determination the comptroller shall give notice thereof to the

person interested who shall be entitled to maintain a proceeding under article seventy-eight of the civil practice act to review such determination * * *.

"Sec. B46-9.0. Remedies Exclusive.—The remedies provided by sections B46-6.0 and B46-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title; * * *.

"Sec. B46-11.0. General Powers of the Comptroller.—In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

* * *

"8. To prescribe methods for determining allocations of receipts to the city."

Regulations Promulgated by Comptroller

Article 211—

"1. Regular Allocation Formula

"A taxpayer who has receipts from sales in interstate commerce is required to make an allocation and apportionment of such receipts on the basis prescribed by subdivision 1 of this article. The formula herein set forth is based upon three factors which are calculated to effect a fair and proper apportionment of receipts from sales in interstate commerce to the end that only that part of such receipts which is properly attributable and allocable to the doing of business within the City of New York is included in the measure of the tax. * * *

"(1) *The Property Factor.*—The taxpayer is required to set forth (a) the total average value of all real and tangible personal property employed in business within the City of New York, and (b) the total average value of all such property employed in business within and without the City of New York but within the United States. A percentage is then to be computed on the basis of a fraction using the elements under (a) as the numerator and those under (b) as the denominator.

* * *

"(2) *The Wages and Salaries Factor.*—The taxpayer is required to set forth the total amount of wages, salaries and other personal service compensation paid during the basic period (a) to officers and employees who work in, or from, or are attached to, places of business located within the City of New York, and (b) to all officers and employees engaged within and without the City of New York but within the United States. A percentage is then to be computed on the basis of a fraction using the elements under (a) as the numerator and those under (b) as the denominator.

* * *

"(3) *The Receipts Factor.*—The taxpayer is required to segregate the gross receipts from sales made during the basic period and place them into the following categories:

"(a) Receipts from sales in foreign commerce.

"(b) Non-allocable and non-taxable receipts.

"(c) Wholly taxable receipts.

"(d) Allocable receipts, i.e., receipts from sales in interstate commerce subject to allocation.

"In making the segregation of gross receipts for the basic period, all categories of receipts are to be shown less sales returns.

"After the above segregation is made, receipts from sales in foreign commerce and non-allocable and non-taxable receipts are to be deducted from gross receipts preparatory to calculating the percentage required for the receipts factor. A percentage is then to be computed on the basis of a fraction using as the numerator the sum of wholly taxable receipts plus one-third of allocable receipts as the denominator the sum of wholly taxable receipts plus the entire allocable receipts.

"Computation of Allocated Receipts To Be Included in Measure of Tax

"The percentages which are determined for the three factors hereinabove described are to be added together and the total thereof divided by three to obtain the average of the three percentages. If the numerator and the denominator of any fraction are both zero, the factor is deemed to be non-existent and shall be omitted in calculating the average of the percentages. In such event, the total of the remaining percentages is to be divided by the number of existing factors. If, however, the numerator alone is zero and the denominator is represented by an amount, there is a resultant factor, viz., zero, which is to be included in the calculation of the average of the percentages.

"Where the resultant average of the percentages exceeds 66 $\frac{2}{3}$%, it shall be reduced to 66$\frac{2}{3}$% for the purpose of allocation. Where the resultant average of the percentages is less than 33$\frac{1}{3}$%, it shall be increased to 33$\frac{1}{3}$% for the purpose of allocation.

"The amount of allocated receipts to be included in the measure of the tax is determined by applying the resultant average of the percentages or the maximum of 66$\frac{2}{3}$% or the minimum of 33$\frac{1}{3}$%, as the case may be, to the entire allocable receipts, i.e., receipts from sales in interstate commerce subject to allocation. The amount of receipts so allocated to the City of New York plus the amount of wholly taxable receipts are to be included in the measure of the tax."

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"* * * Stated as a fraction the formula is as follows:

$$\text{Property in NYC} \times \frac{\text{Allocable receipts}}{\text{Allocable and wholly taxable receipts}} = \text{Numerator}$$

$$\text{Numerator} \div \text{Property outside NYC} \times \frac{\text{Allocable receipts}}{\text{Allocable and nontaxable receipts}} = \text{Denominator}$$

* * *"